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Attorneys for Plaintiffs

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

COTTONWOOD
ENVIRONMENTAL LAW
CENTER; LIZ AMETSBOSCHLER;
DANNY CHORIKI; JEREMY
DRAKE; AVIV GUSCIO; KATIE
HARRISON; YOUPA STEIN; MARY
STRANAHAN; JAN SWANSON;
TOMAS WALDORF,

Plaintiffs,

vs.

STATE OF MONTANA,

Defendant.

Cause No:

**COMPLAINT FOR
DECLARATORY and
INJUNCTIVE RELIEF**

INTRODUCTION

1. This case challenges H.B. 407, legislation that was enacted in 2021 to prevent cities across the state of Montana from regulating single-use plastics. H.B. 407 is facially unconstitutional because it infringes upon Plaintiffs’ constitutional right to pass local ballot initiatives. H.B. 407 is also unconstitutional because it infringes upon Plaintiffs’ constitutional right to a clean and healthful environment.

PARTIES, VENUE & JURISDICTION

2. Plaintiff Cottonwood Environmental Law Center (“Cottonwood”) is a conservation organization based in Bozeman, a city located in Gallatin County, Montana. Cottonwood is dedicated to protecting the people, forests, water, and wildlife of the American West. Cottonwood members are residents of the state of Montana whose rights under the Montana Constitution¹ have been and are being violated and infringed upon by H.B. 407.
3. Plaintiff Liz Ametsboschler is a resident of Missoula, a city located in Missoula County, Montana. Ms. Ametsboschler votes in local elections and pays taxes to the City and County of Missoula. A portion of the taxes she pays to Missoula County is used to fund local climate and sustainability initiatives. Ms. Ametsboschler generally utilizes a private landfill owned and operated by Republic Services, Inc. to dispose of waste, including single-use plastics that are not recycled or not recyclable.
4. Plaintiff Jeremy Drake is a resident of Missoula, Montana. Mr. Drake votes in local elections and pays taxes to the City and County of Missoula. A portion of the taxes he pays to Missoula County is used to fund local climate and sustainability initiatives. Mr. Drake generally utilizes the private landfill owned and operated by

¹ All subsequent references to “the Constitution” and “constitutional” are in reference to the 1972 Montana Constitution.

Republic Services, Inc. to dispose of waste, including single-use plastics that are not recycled or not recyclable.

5. Plaintiff Aviv Guscio is a resident of Missoula, Montana. Ms. Guscio votes in local elections and pays taxes to the City and County of Missoula. A portion of the taxes she pays to Missoula County is used to fund local climate and sustainability initiatives. Ms. Guscio generally utilizes the private landfill owned and operated by Republic Services, Inc. to dispose of waste, including single-use plastics that are not recycled or not recyclable.
6. Plaintiff Jan Swanson is a resident of Missoula, Montana. Ms. Swanson votes in and pays taxes to the City and County of Missoula. A portion of the taxes she pays to Missoula County is used to fund local climate and sustainability initiatives. Ms. Guscio utilizes the private landfill owned and operated by Republic Services, Inc. to dispose of waste, including single-use plastics that are not recycled or not recyclable.
7. Plaintiff Katie Harrison is a resident of Billings, a city located in Yellowstone County, Montana. Ms. Harrison votes in local elections, and pays fees and taxes to the City of Billings and Yellowstone County. A portion of the fees she pays to Billings is used to fund waste collection, including single-use plastics that are not recycled or not recyclable, which is disposed of in a city-operated and -financed landfill.
8. Plaintiff Danny Choriki is a resident of Billings, Montana. Mr. Choriki is a member of the Billings City Council, votes in local elections, and pays fees and taxes to the city. A portion of the fees paid to Billings is used to fund waste collection, including single-use plastics that are not recycled or not recyclable, which is disposed of in a city-operated and -financed landfill.
9. Plaintiff Youpa Stein is a resident of Arlee, Montana, an unincorporated community and census-designated place in Lake County. Ms. Stein votes in Lake County and

pays property-based fees to the county, a portion of which is used to fund waste disposal. Most household waste produced in Lake County, including single-use plastics that are not recycled or recyclable, is transferred to the Republic Services landfill in Missoula, MT.

10. Plaintiff Mary Stranahan is a resident of Arlee, Montana. Ms. Stranahan votes in Lake County and pays property-based fees to the county, a portion of which is used to fund waste disposal. Most household waste produced in Lake County, including single-use plastics that are not recycled or recyclable, is transferred to the Republic Services landfill in Missoula, MT.
11. Plaintiff Tomas Waldorf is a resident of Bozeman, Montana. Mr. Waldorf votes in local elections, and pays taxes to the City of Bozeman and Gallatin County. A portion of the taxes he pays to Gallatin County is used to collect waste, including single-use plastics that are not recycled or not recyclable, which are disposed of in a landfill owned and operated by Gallatin County.
12. Plaintiffs' constitutional power to pass local regulations of single-use plastics via ballot initiative is infringed and impaired by H.B. 407. *See* Mont. Const. Art. III, § 1; Art. XI § 8.
13. Plaintiffs are persons whose rights are affected by Sections 7-1-111(21), 7-1-121, and 7-5-131(2)(f), MCA because the cities of Bozeman and Missoula have passed resolutions stating they would regulate single-use plastics if the challenged H.B. 407 was rescinded or vacated.
14. Plaintiffs' fundamental constitutional rights to a clean and healthful environment (pursuant to Article IX, section 1 and Article II, section 3) are infringed and impaired by H.B. 407.
15. Plaintiffs have brought this action under the Uniform Declaratory Judgments Act ("UDJA") found at Title 27, Chapter 8, of the Montana Code Annotated. This Court has held that a party raising a "bona fide constitutional issue" can seek relief

from the courts through a declaratory judgment action. *Stuart v. Dept. of Social & Rehab. Serv.*, 247 Mont. 433, 438–39, 807 P.2d 710, 713 (1991) (quoting *Mitchell v. Town of West Yellowstone* (1988), 235 Mont. 104, 109–10, 765 P.2d 745, 748). Furthermore, the UDJA itself provides that it is remedial and that it is to be liberally construed and administered to permit courts “to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations....” Section 27-8-102, MCA. Plaintiffs’ complaint states a justiciable controversy concerning their constitutional reserved powers of initiative and referendum, and each Plaintiff has standing to challenge the Defendant’s impositions on Plaintiffs’ reserved powers. *See Gryczan v. State*, 283 Mont. 433, 440–46, 841 P.2d 112, 117–20 (1997).

16. Defendant State of Montana is a political subdivision of the United States of America created pursuant to an enabling act passed by Congress on February 22, 1889 (1889, Stat. 676).
17. Article II, section 3 of the Constitution grants Montana citizens the right to a clean and healthful environment. Article IX, section 1 of the Constitution imposes a duty on the State to maintain and improve a clean and healthful environment for present and future generations.
18. Venue for this action lies in Lewis and Clark County, Montana, pursuant to Section 25-2-126(1), MCA because Defendant State of Montana, by and through its Legislature and Governor, governs over and performs official duties in Lewis and Clark County.
19. This Court has jurisdiction over the parties and subject matter over this action pursuant to Article VII, section 4 of the Constitution and Section 3-5-302, MCA. This Court has jurisdiction to issue the declaration requested pursuant to the Montana Declaratory Judgment Act, Section 27-8-101, et. seq. MCA. This Court has jurisdiction to issue the permanent injunction requested pursuant to Section 27-19-101, et. seq. MCA.

FACTUAL BACKGROUND

20. In 2021, the Montana Legislature passed, and Montana Governor Greg Gianforte signed, House Bill No. 407 (H.B. 407). H.B. 407 prohibits local governments and their electors from adopting ordinances, resolutions, initiatives and referendums regulating “Auxiliary Containers.” “Auxiliary Containers” is a term manufactured by the Montana Legislature to refer to what are commonly known as “single-use plastics.” Single-use plastics include (but are not limited to) bottles, straws, grocery bags, eating utensils and food packaging.
21. Single-use plastics pose a grave threat to citizens’ right to, and the State of Montana’s ability to, maintain a clean and healthful environment. The widespread use of such products has led to ubiquitous plastic accumulation in Montana’s waters and soil, resulting in severe impacts on human health, wildlife, and recreational resources. The manufacture and destruction of single-use plastics also emits toxic chemicals and greenhouse gases (GHGs) into the air, resulting in localized damage to the health of Montana’s citizens as well as diffuse—yet devastating—impacts on the earth’s global climate.
22. In 2021, the Montana Legislature passed, and Montana Governor Greg Gianforte signed, H.B. 407. It was titled:

AN ACT GENERALLY REVISING LAWS RELATED TO
ESTABLISHING STATEWIDE UNIFORMITY FOR AUXILIARY
CONTAINER REGULATIONS; PREEMPTING LOCAL
ORDINANCES, RESOLUTIONS, INITIATIVES OR
REFERENDUMS REGULATING AUXILIARY CONTAINERS;
PROHIBITING LOCAL GOVERNMENTS FROM ADOPTING OR
ENFORCING ORDINANCES, RESOLUTIONS, INITIATIVES OR
REFERENDUMS REGULATING THE USE, DISPOSITION, SALE,
PROHIBITIONS, FEES, CHARGES ON TAXES FOR AUXILIARY
CONTAINERS; PROVIDING CERTAIN EXCEPTIONS; AND
AMENDING 7-1-111 & 7-5-135.

23. H.B. 407 has been codified as Sections 7-1-111(21), 7-1-121 and 7-5-131(2)(f), MCA.
24. Section 7-1-111(21), MCA denies local governments with self-government powers the power to adopt ordinances, resolutions, initiatives, or referenda regulating “auxiliary containers” as defined in Section 7-1-121(5)(a), MCA. That section defines “auxiliary containers” as “any bag, cup, bottle, can, device, eating and drinking utensil or tool, or other packaging, whether reusable or single-use that is: (i) made of ... plastic, including foamed or expanded plastic....”
25. The term “Auxiliary Container” is not a term in common usage. The commonly used term for the items described in Section 7-1-121(5)(a), MCA is “single-use plastics.” This Complaint uses “single-use plastics” to avoid confusion unless it is necessary to refer to the statutory term.
26. The term “single-use plastics” is defined as: “commonly used plastic items intended to be used only once before they are thrown away or recycled, e.g. grocery bags, food packaging, bottles, straws, containers, cups, cutlery, etc.”²
27. Section 7-1-121(2), MCA prohibits all local governments from adopting any ordinance, resolution, initiative, or referendum that regulates single-use plastics. Section 7-5-131(2), MCA declares that the People’s power of initiative or referendum does not extend to the regulation of single-use plastics.
28. H.B. 407 did not contain any uniform statewide regulations of single-use plastics. Moreover, the Montana Legislature did not pass any Bills in 2021 that contained uniform statewide regulations for single-use plastics.
29. The Montana Legislature passed H.B. 407 because proponents of the Bill argued that uniform, statewide regulations for single-use plastics were preferred to local

² United Nations, *United Nation Plastic Glossary: Single-use plastics* (last visited Oct. 8, 2023), <https://leap.unep.org/taxonomy/term/5825>.

government regulations for single-use plastics.³ Specifically, the Bill’s sponsors argued that if local governments were allowed to adopt regulations for single-use plastics that were different from one another, those regulations would impose an undue burden upon businesses. However, the Legislature did not receive any study, report or other documentation which supported that argument.

30. In 2021, the Montana Legislature refused to pass three bills that regulated single-use plastics on a statewide basis. Senate Bill 120 (S.B. 120) limited retail food establishments from distributing plastic straws unless requested by a customer. Senate Bill 121 (SB 121) regulated the use of disposable carry-out bags. House Bill 215 (H.B. 215) regulated polystyrene, commonly known as Styrofoam.
31. On December 20, 2022, the City of Bozeman adopted Resolution 5470, in which it expressed its interest in adopting an ordinance or resolution regulating single-use plastics if allowed to do so by law.⁴
32. Similarly, on February 6, 2023, the City of Missoula adopted Resolution 8660, in which it expressed its interest in adopting an ordinance or resolution regulating single-use plastics if allowed by law.⁵
33. On February 24, 2022, the Associated Students of Montana State University passed a resolution to eliminate single-use plastics.⁶

³ See Mike Dennison, *MT House says local gov'ts can't regulate food containers*, KTVH NEWS (Jan. 13, 2023), <https://www.ktvh.com/news/montana-politics/mt-house-says-local-govts-cant-regulate-food-containers> (“This bill is simply saying that certain prohibitions on the products we all use should be done on a statewide basis, so that consumers and businesses have one standard that covers the entire state . . . We should not have dozens of different prohibitions.” (quoting Rep. Mark Noland, R-Bigfork, who sponsored H.B. 407)).

⁴ CITY OF BOZEMAN, MT, RESOLUTION 5470 (Dec. 20, 2002). *Available at:* https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/1702313/Resolution_5470_Support_for_Plastic_Ban.pdf.

⁵ CITY OF MISSOULA, MT, RESOLUTION 8660 (Feb. 6, 2023). *Available at:* <https://www.ci.missoula.mt.us/DocumentCenter/View/64639/Resolution-8660>.

⁶ ASSOCIATED STUDENTS OF MONTANA STATE UNIVERSITY, RESOLUTION 2022 R-02 <https://www.montana.edu/asmsu/2022r02.html> (last visited November 17, 2023).

34. The Montana Legislature refused to adopt any uniform, statewide regulations for single-use plastics despite Bozeman’s and Missoula’s resolutions expressing interest in regulating them. In response, proponents of single-use plastic regulation introduced H.B. 413 during the 2023 legislative session. That Bill would have repealed H.B. 407 as codified in Sections 7-1-111(21), 7-1-121 and 7-5-131(2)(f), MCA. The Legislature refused to pass H.B. 413 because proponents of H.B. 407 again argued that uniform, statewide regulations of single-use plastics were preferable to potentially conflicting regulations adopted by different local governments.
35. However, the Montana Legislature once again did not receive any study, report or other documentation that supported that argument. On the other hand, the Legislature received studies, reports and other documentation that established that single-use plastics caused serious harm to a clean and healthful environment.
36. In 2023, the Montana Legislature did not pass any Bills that contained uniform statewide regulations for single-use plastics. In 2023, the Legislature refused to pass House Bill 638 (H.B. 638). That Bill regulated polystyrene, commonly known as Styrofoam.
37. The most recent comprehensive study of plastic pollution was published in 2023 by the Minderoo-Monaco Commission on Plastics and Human Health in the *Annals of Global Health* (Landrigan et al., hereinafter “Commission”).⁷ The study was coordinated by The Global Observatory on Planetary Health at Boston College. The Commission consisted of scientists, clinicians, and policy analysts from around the world. Commission at 7.

⁷ P.J. Landrigan et al., *The Minderoo-Monaco Commission on Plastics and Human Health*, 89 ANNALS OF GLOBAL HEALTH. 1, 1–215 (2023). DOI: <https://doi.org/10.5334/aogh.4056>.

38. The World produced 2 megatons (Mt) of plastics in 1950.⁸ *Id.* at 2, 10. The production of plastics in the World grew to 460 Mt by 2019, a 230-fold increase. *Id.* That production is expected to triple by 2060. *Id.* at 9.
39. The World produced 131 Mt of single-use plastic in 2019, followed by 137 Mt in 2021. *Id.* The world is predicted to produce 148 Mt of single-use plastic in 2027. *Id.* at 29.
40. Thirty-five to forty percent (35–40%) of all plastics produced are single-use. *Id.* at 11. Production of single-use plastics is predicted to increase by thirty percent (30%) between 2021 and 2025. *Id.*
41. Only nine percent (9%) of single-use plastic produced in the world is recycled. *Id.* at 11. The other ninety-one percent (91%) is disposed of by burying it in landfills, burning or by littering. *Id.* Therefore, after accounting for a nine percent (9%) rate of recycling, an estimated 119 Mt of single-use plastics were buried, burned, or littered in 2019, followed by another 124 Mt in 2021. *Id.* If the World’s current recycling rate remains unchanged, 134 Mt is predicted to be similarly disposed of in 2027. *Id.*
42. In the United States, fourteen percent (14%) of single-use plastics were burned, seventy-six percent (76%) were landfilled, and eight percent (8%) were recycled. *Id.*
43. While it is difficult to accurately assess the fate of single-use plastics consumed at the state level,⁹ the Montana Department of Environmental Quality (MT DEQ) estimates that only about nineteen percent (19%) of the overall waste generated in

⁸ One megaton (Mt) is the equivalent of one million (1,000,000) tons.

⁹ See STATE OF MONTANA 2016 RECYCLING AND WASTE DIVERSION SUMMARY (2016) at 2 (“...it’s important to note that several businesses chose not to divulge their 2016 recycling information. In addition, the information from some retail stores — particularly “big box” stores that recycle cardboard and plastic — is not included because this information is not currently available on a state level.”). *Available at:* <https://deq.mt.gov/files/Land/Recycle/Documents/pdf/RecyclingSummary2016.pdf>.

Montana is recycled.¹⁰ This is because, as MT DEQ explains, “[r]ecycling in Montana comes with barriers that most other states do not have. Due to our low population density and large geographical area, it is very difficult to find markets for materials that are both economically and environmentally sustainable and desirable.”¹¹

44. According to the State’s most recent public data on waste disposal (published in 2016), Montana generated 1,803,435 tons of Municipal Solid Waste (MSW) over the course of that year, of which 1,430,414 tons were landfilled and 373,021 tons were either collected for recycling, or diverted from the waste stream.¹² These numbers do not account for waste in the form of litter, which continues to accumulate in Montana’s forests, rivers, lakes, and other wilderness areas. Further, given that Montana’s population has increased from an estimated 1,042,137 people in 2016 to an estimated 1,122,867 people in 2022,¹³ the amount of MSW generated by Montanans today is almost certainly much higher.
45. Despite Montana’s ballooning population, the percent of waste that is recycled in the state year-over-year has not meaningfully improved, with estimates ranging from fifteen percent (15%) in 2003 to seventeen-point-one percent (17.1%) in 2016 to nineteen percent (19%) today.¹⁴
46. Single-use plastics are a particularly pernicious form of pollution compared to most other forms of waste because, despite their single-use purpose, they will remain in

¹⁰ Montana Department of Environmental Quality, *Recycling: Program Overview* (last visited Oct. 8, 2023), <https://deq.mt.gov/twr/Programs/recycling>.

¹¹ *Id.*

¹² STATE OF MONTANA 2016 RECYCLING AND WASTE DIVERSION SUMMARY (2016) at 3.

¹³ USAFacts, *Our Changing Population: Montana* (last updated July 2022), <https://usafacts.org/data/topics/people-society/population-and-demographics/our-changing-population/state/montana/>; U.S. Census Bureau, *QuickFacts: Montana* (July 1, 2022), <https://www.census.gov/quickfacts/fact/table/MT/PST045222>.

¹⁴ STATE OF MONTANA 2016 RECYCLING AND WASTE DIVERSION SUMMARY (2016) at 1.

the earth's environment for anywhere from twenty (20) years to (1000) years before they decompose naturally.¹⁵

47. Burning single-use plastics speeds up the decomposition process, but doing so in an uncontrolled setting will emit GHGs and toxic chemicals into the atmosphere, including carbon dioxide (CO₂), hydrogen chloride (HCl), black carbon (BC), volatile organic compounds (VOCs) and polycyclic aromatic hydrocarbons (PAHs).¹⁶ CO₂ is the primary GHG emitted through human activities, and can have a variety of health effects on humans depending on its atmospheric concentration.¹⁷ HCl can irritate the skin, nose, eyes, throat, and larynx.¹⁸ BC, a major component of soot, is the most solar energy-absorbing component of particulate matter and can absorb one million times more energy than CO₂.¹⁹ VOCs are known to cause eye, nose, and throat irritation; headaches; loss of coordination; nausea; damage to the liver, kidney and central nervous system; and some are suspected or known carcinogens.²⁰ PAHs are known carcinogens and are estimated

¹⁵ See, e.g., Margaret Kolcon, *Plastic Prohibition: The Case For A National Single-Use Plastic Ban In The United States Ban In The United States*, 9 PENN ST. J. OF L. & INT'L AFF. 194, 197 (2020–2021); United Nations, *In Images: Plastic is Forever* (June 2021), <https://www.un.org/en/exhibits/exhibit/in-images-plastic-forever>.

¹⁶ See, e.g., Cruz M. Bardales et al., *Plastic waste generation and emissions from the domestic open burning of plastic waste in Guatemala*, 3 ENV'T SCI.: ATMOSPHERES 156, 156–57 (2022). DOI: <https://doi.org/10.1039/d2ea00082b>; see also Rinku Verma et al., *Toxic Pollutants from Plastic Waste – A Review*, 35 PROCEDIA ENV'T SCI. 701, 701–08 (2016). DOI: <https://doi.org/10.1016/j.proenv.2016.07.069>.

¹⁷ U.S. Environmental Protection Agency, *APPENDIX B: Acute Health Effects of Carbon Dioxide* (2015-2016). Available at: <https://www.epa.gov/sites/default/files/2015-06/documents/co2appendixb.pdf>.

¹⁸ Centers for Disease Control and Prevention, *Hydrogen Chloride* (last reviewed June 21, 2019), <https://www.cdc.gov/niosh/topics/hydrogen-chloride/default.html>.

¹⁹ Renee Cho, *The Damaging Effects of Black Carbon*, COLUMBIA CLIMATE SCHOOL STATE OF THE PLANET (Mar. 22, 2016), <https://news.climate.columbia.edu/2016/03/22/the-damaging-effects-of-black-carbon/>.

²⁰ U.S. Environmental Protection Agency, *Volatile Organic Compounds' Impact on Indoor Air Quality* (last updated Aug. 15, 2023), <https://www.epa.gov/indoor-air-quality-iaq/volatile-organic-compounds-impact-indoor-air-quality>.

to have caused eight-point-seven (8.7) cases of cancer per one million (1,000,000) people exposed. Commission at 34.

48. In 2019, plastics generated an estimated 1.984 billion (1,984,000,000) Mt of GHGs—approximately three-point-four percent (3.4%) of global emissions—with ninety percent (90%) of these emissions coming from their production and conversion from fossil fuels.²¹ Emissions from the plastics lifecycle are predicted to more than double by 2060, reaching an estimated 4.740 billion (4,740,000,000) Mt of GHG emissions.²²
49. Single-use plastics that are buried in landfills are associated with ground and surface water pollution as well as soil pollution. Commission at 36.
50. Single-use plastics that are littered can enter the environment on either a macroscopic or microscopic scale. “Macroplastics” are particles greater than five (5) mm in size. *Id.* at 37. An estimated one point one (1.1) Mt of single-use plastic was discarded in 2019. *Id.* at 30. “Microplastics” are particles less than five (5) mm in size. *Id.* at 37. They can occur as the result of either the incineration or the natural degradation of single-use plastics. *Id.* at 30. When plastics are disintegrated to the point of being microplastics, they are disbursed into the air, soil and water. *Id.*
51. The pollution from single-use plastics has entered Montana’s waters. In 2017, a survey of seventy-two (72) sites in the Gallatin River Watershed was conducted to determine the presence of microplastics. Fifty-seven percent (57%) of the sites were found to be contaminated by microplastics.²³

²¹ This number, as well as the predicted number that follows, are converted from tonnes (metric) for consistency. See Organisation for Economic Co-operation and Development, *Plastic leakage and greenhouse gas emissions are increasing*, OECD (last visited Oct. 8, 2023), <https://www.oecd.org/environment/plastics/increased-plastic-leakage-and-greenhouse-gas-emissions.htm>

²² *Id.*

²³ Abigail P.W. Barrows et al., *A Watershed Scale, Citizen Source Approach to Quantifying Microplastic Concentration in a Mixed Land-Use River*, 147 WATER RESEARCH 382, 385–86 (2018). DOI: <https://dx.doi.org/10.1016/j.watres.2018.10.013>.

52. In 2019, Environment Montana, an affiliate of Environment America (a federation of state-based environmental advocacy organizations), conducted a survey of fifty (50) fishing access sites in Montana.²⁴ Thirty-three (33) of those sites were contaminated by microplastics.²⁵
53. In 2022, the University of Montana’s Flathead Lake Biological Station conducted a survey of twelve (12) locations in Flathead Lake.²⁶ The survey discovered microplastics in all surveyed locations. It found that microplastics were deposited in Flathead Lake in one of three ways: (1) “atmospheric microplastic deposition” from clouds and wind; (2) flows from “major river inputs;” and (3) “lakeside sources near larger shoreline communities.” *Id.* The Report concluded that microplastics were interfering with the Flathead Lake food chain because animals like zooplankton and fish ingest it. *Id.*
54. Plastics contribute to global climate change because GHGs are released at every stage of the plastic life cycle, from extraction to transportation to production to consumption to disposal. Commission at 41. According to the Commission’s report, “the total global plastic-associated GHG emissions are higher than the total net GHG emissions of most individual countries.” *Id.*
55. In sum, single-use plastic endangers human and environmental health at every stage of its life cycle. It causes disease, disability, and premature death. Infants are the ones most at risk for the consequences of plastic pollution. *Id.* at 71.

²⁴ ENVIRONMENT MONTANA RESEARCH & POLICY CENTER, MICROPLASTIC IN MONTANA A STUDY OF FIFTY RIVER ACCESS SITES (Oct. 30, 2019). *Available at:* <https://environmentmontana.org/sites/environment/files/reports/Microplastic%20in%20Montana%20%28final%29.pdf>.

²⁵ *Id.* at 5 (“Of the fifty sites tested, thirty-three (66%) contained one or more types of microplastic. Half (50%) of the sites contained microplastic fragments; twenty-one (42%) of the sites contained fibers; and nine (18%) of the sites contained film.”).

²⁶ Flathead Lake Biological Station, *Microplastics in Flathead Lake*, UNIVERSITY OF MONTANA (June 17, 2022), <https://flbs.umt.edu/newflbs/outreach/news-blog/posts/microplastics-in-flathead-lake/>.

LEGAL BACKGROUND

56. One of the most fundamental precepts of the 1972 Montana Constitution is that all power is derived from the people. Art. II, § 1.
57. Article V, section 1 of the Constitution explicitly distinguishes the power of the legislature from the power of the people:

Power and Structure. The legislative power is vested in a legislature consisting of a senate and a house of representatives. The people reserve to themselves the powers of initiative and referendum.

58. The Constitution provides Montana citizens with the power to enact laws through the state-wide initiative process. Art. III, § 4.
59. The Constitution extends the process to local ballots initiatives. Art. XI, § 8.
60. Citizen initiatives “should be broadly construed to maintain the maximum power in the people.” *State ex rel. Harper v. Waltermire*, 213 Mont. 425, 429, 691 P.2d 826, 829 (1984).
61. The Constitution defines the relationship between the Legislature and local governments. Article XI, section 4 provides that local governments without a self-government charter have only the powers specifically granted to them by the Legislature. In contrast, Article XI, section 6 of the Constitution provides:

Self-Government powers. A local government unit adopting a self-government charter may exercise any power not prohibited by the constitution, law or charter...

62. The powers of a local government that has adopted a self-government charter must be liberally construed. *See City of Missoula v. Armitage*, 2014 MT 274, ¶ 14, 376 Mont. 448, 335 P.3d 736. The Framers of the Constitution intended for local governments adopting a self-government charter to have “more freedom in determining their local affairs” than before its adoption.²⁷

²⁷ Montana Constitutional Convention, *Comments on Committee Proposal*, Vol. II (Feb 19, 1972) at 797.

63. Montanans have a right to a clean and healthful environment guaranteed by Article II, section 3 of the Constitution. That section provides:

Inalienable rights. All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment...

64. Montanans' constitutional right to a clean and healthful environment is a fundamental one because it appears in the Constitution's Declaration of Rights. *See Mont. Env'tl. Info. Ctr. v. Dep't of Env'tl. Quality*, 1999 MT 248, ¶ 63, 296 Mont. 207, 988 P.2d 1236 (MEIC I); *Park Cty. Env'tl. Council v. Mont. Dep't of Env'tl. Quality*, 2020 MT 303, ¶ 60, 402 Mont. 168, 477 P.3d 288; *see also McDermott v. Montana Dept. of Corrections*, 2001 MT 134, ¶¶ 31–32, 305 Mont. 462, 29 P.3d 992.

65. The State and every person, including local governmental units, have a constitutional duty to maintain and improve a clean and healthful environment imposed by Article IX, section 1, of the Constitution. That section provides:

Protection and Improvement. (1) The state and every person shall maintain and improve a clean and healthful environment in Montana for present and future generations.

66. This Article and section are interrelated and interdependent with Article II, section 3 of the Constitution. *See MEIC I*, ¶ 64.

67. The Legislature has an affirmative duty under Article XI, section 1(3) of the Constitution to provide adequate remedies for the protection of the environmental life support systems from degradation. That section provides:

The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation ...

68. The term “shall” imposes a mandatory obligation that does not grant discretion to the Legislature. *Swearington v. State*, 2001 MT 10, ¶ 6, 304 Mont. 97, 18 P.3d 998; *State ex. rel. Palmer v. Hart*, 201 Mont. 526, 533, 655 P.2d 965, 968–69 (1982).

69. This Court has the power to review the constitutionality of a statute to determine if that statute implicates a fundamental constitutional right. *MEIC I, supra*, ¶ 64. This Court must apply strict scrutiny to a statute implicating a fundamental right. *McDermott, supra*, ¶ 31. That statute survives strict scrutiny only if it:
- ... accomplish[es] a compelling state interest and that its (the legislature’s) action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the state’s objective.
- Brown v. Gianforte*, 2021 MT 149, ¶ 32, 404 Mont. 269, 488 P.3d 548.
70. A “compelling state interest” is “at a minimum some interest of the ‘highest order and ... not otherwise served” or “the gravest abuse endangering a paramount government interest.” *Cape-France Enters. v. Estate of Peed (Cape-France)*, 2001 MT 139, ¶ 31, 305 Mont. 513, 29 P.3d 1011 (citing *Armstrong v. State*, 1999 MT 261, ¶ 41, n. 6, 296 Mont. 361, 989 P.2d 364).
71. Defendant State has the burden of proving that a challenged statute serves a compelling state interest. *Weems v. State*, 2023 MT 82, ¶ 44, 412 Mont. 132, 529 P.3d 798.
72. If a statute, without doubt, contradicts a constitutional provision, the Court may invalidate it. *Am. Cancer Soc’y v. State*, 2004 MT 376, ¶ 8, 325 Mont. 70, 103 P.3d 1085.

CLAIMS FOR RELIEF

I. FIRST CLAIM FOR RELIEF

73. Plaintiffs replead all allegations set forth above and incorporate them by reference.
74. Every Montanan has the power to enact local laws by initiative and referendum. That right is found in Article II, section 1; Article V, section 1; and Article XI, section 8 of the Constitution. Those sections provide:

[Art. II, § 1] **Popular Sovereignty.** All political power is vested in and derived from the people. All government of right originates with the people, is founded upon their will only, and is instituted for the good of the whole.

[Art. V, § 1] **Power and Structure.** ... The people reserve to themselves the power of initiative and referendum.

[Art. XI, § 8] **Initiative and Referendum.** The legislature shall extend the initiative and referendum powers reserved to the people by the constitution to the qualified electors of each local government unit.

75. The Montana Constitution does not confer any direct or enabling power on the Montana legislature to regulate proposed constitutional initiatives.
76. Where legislative action infringes upon constitutionally granted powers, the legislation must yield. *Bd. of Regents of Higher Educ. of Mont.*, 2022 MT at ¶ 24.
77. H.B. 407 denies local electors the power to enact laws that would regulate single-use plastics by popular initiative. Thus, H.B. 407 unconstitutionally infringes upon Montana citizens' power to pass local initiatives to regulate single-use plastics by initiative or referendum.
78. Section 7-1-121 and 7-5-131, MCA implicate the power of local government electors to pass initiatives or referendums guaranteed by Article XI, section 8 of the Constitution. Section 7-1-121, MCA prohibits local governments from adopting initiatives or referendums regulating single-use plastics and Section 7-5-131, MCA denies local electors the right to pass initiatives or referendums regulating single-use plastics. Section 7-1-121, MCA reads in pertinent part:
 - (2) Except as provided in subsection (3), a local unit of government may not adopt an ordinance, resolution, initiative or referendum that:
 - a. regulates the use, sale or disposition of auxiliary containers;
 - b. prohibits or restricts auxiliary containers; or
 - c. imposes a fee, charge or tax on auxiliary containers.

Section 7-5-131, MCA reads in pertinent part:

(1)(f) The powers of initiative and referendum are reserved to the electors of each local government...

(2) The powers of initiative and referendum do not extend to:

...

(f) the regulation of auxiliary containers defined in 7-1-121(5) and prohibited in 7-1-121(2).

79. Sections 7-1-121 and 7-5-131, MCA are unconstitutional on their face. There is no set of circumstances under which these statutes would be valid. They are unconstitutional in all applications. *See Citizens for a Better Flathead v. Flathead Bd. of Cty. Comm'rs of Flathead Cty.*, 2016 MT 325, ¶ 45, 385 Mont. 505, 386 P.3d 567; *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131.
80. Section 7-1-121, MCA prohibits local governmental units from adopting initiatives and referendums under any circumstances that regulate single-use plastics, and Section 7-5-131, MCA denies local electors the right to pass initiatives or referendums under any circumstances that regulate single-use plastics. Both statutes, on their face, violate the right to initiative and referendum guaranteed by Article II, section 1; Article V, section 1; and Article IX, section 8 of the Constitution. As a result, Plaintiffs are entitled to a declaration that Sections 7-1-121 and 7-5-131, MCA are unconstitutional.

II. SECOND CLAIM FOR RELIEF

81. Plaintiffs replead all allegations set forth above and incorporate them by reference.
82. Every Montanan has a right to a clean and healthful environment guaranteed by Article II, section 3 of the Constitution. That section reads:
- Inalienable rights.** All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment...
83. The right to a clean and healthful environment is a fundamental one. *See MEIC I, supra*, at ¶ 63.

84. Sections 7-1-111(21) and 7-1-121, MCA implicate the constitutional right to a clean and healthful environment because they prohibit regulations that are necessary to maintain a clean and healthful environment pursuant to Article II, section 3, and because they prevent local governments from fulfilling their constitutional duty to regulate single-use plastics pursuant to Article IX, section 1 of the Constitution.
85. The cities of Bozeman and Missoula passed resolutions indicating they would regulate single-use plastics if H.B. 407 and Sections 7-1-111(21) and 7-1-121, MCA were rescinded. *See* ¶¶ 31–32, *supra*.
86. The challenged sections of the MCA provide in pertinent part:

Section 7-1-111. **Powers denied.** A local government unit with self-government powers is prohibited from exercising the following:

...

(21) any power as prohibited by 7-1-121(2) affecting, applying to, or regulating the use, disposition, sale, prohibitions, fees, charges, taxes on auxiliary containers as defined in 7-1-121(5).

...

Section 7-1-121. Statewide uniformity for auxiliary container regulations-Local prohibitions-definitions.

...

(2) Except as provided in subsection (3), a local unit of government shall not adopt or enforce any ordinance, resolution, initiative, or referendum that:

- a. regulates the use, disposition, or sale of an auxiliary container;
- b. prohibits or restricts auxiliary containers; or
- c. imposes a fee, charge or tax on auxiliary containers.

Because Sections 7-1-111(21) and 7-1-121, MCA implicate a constitutional right, they must be strictly scrutinized. *Brown, supra*, at ¶ 32.

87. Sections 7-1-111(21) and 7-1-121(2), MCA will survive strict scrutiny only if they “accomplish a compelling state interest and that its (Legislature’s) action is closely tailored to effectuate that interest and is the least onerous path that can be taken to

achieve the State’s objective.” *Id.*; see also *Weems, supra*, at ¶ 44. Thus, Defendant has the burden of proving that Sections 7-1-111(21) and 7-1-121, MCA serve: (1) a compelling state interest; (2) are closely tailored to effectuate that interest; and (3) are the least onerous path to achieve the State’s objective. If Defendant fails to satisfy any one of these three requirements, these Sections are unconstitutional. See, e.g., *Brown, supra*, at ¶ 32.

88. Sections 7-1-111(21) and 7-1-121, MCA fail to satisfy this first element of the strict scrutiny analysis. A “compelling interest is one that is “at a minimum, some interest of the ‘highest order and ... not otherwise served....” *Cape-France, supra*, at ¶ 31; see also *Armstrong v. State*, 1999 MT 261, ¶ 41 n.6, 296 Mont. 361, 989 P.2d 364. Defendant cannot prove that these Sections serve a compelling state interest. For this reason alone, Sections 7-1-111(21) and 7-1-121, MCA are a violation of Montanans’ fundamental right to a clean and healthful environment guaranteed by Article II, section 3 of the Constitution.
89. Defendants may argue that the compelling interests justifying 7-1-111(21) and 7-1-121, MCA are that uniform, statewide regulations of single-use plastics would (1) fulfill the State’s duty to maintain and improve a clean and healthful environment pursuant to Article IX, section 1(3) of the Constitution, and (2) fulfill the Legislature’s duty to provide adequate remedies to protect the environmental life support systems from degradation pursuant to Article XI, section 1 of the Constitution.
90. These interests are plainly not what 7-1-111(21) and 7-1-121, MCA were functionally designed to accomplish because there are no uniform, statewide regulations to be found anywhere in H.B. 407. The Montana Legislature’s real, and only, interest in passing these Sections of the MCA was to prevent any regulation of single-use plastics at either the local or state level. The interest in preventing any

regulation of single-use plastics at the local level is found in Subsection (1) of Section 7-1-121 MC. which reads:

The purpose of this section is to preempt any local ordinance, resolution, initiative or referendum regulating the use, disposition, sale, prohibitions, fees, charges, or taxes on certain containers.

91. The Legislature’s real interest in preventing any statewide regulation of single-use plastics is also revealed in its failure in the 2021 and 2023 legislative sessions to pass any Bill addressing the harm to a clean and healthful environment caused by single-use plastics, as well as its refusal to pass Bills introduced during those sessions that would have prevented that harm by regulating single-use plastics.
92. The only argument the Legislature advanced to support a prohibition of any local government regulation of single-use plastics in the absence of statewide uniform regulations was that such regulations would be burdensome to business. While the Montana Supreme Court has held that promoting Montana’s economy is a “legitimate” interest, such an interest is not sufficiently compelling to justify violating individuals’ fundamental constitutional rights.²⁸
93. There was no evidence presented to the Montana Legislature to support the conclusion that local regulation of single-use plastics would be unduly burdensome on business. On the other hand, there was significant evidence presented to the Legislature, and significantly more evidence available, to support the conclusion

²⁸ See *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 327–28, 730 P.2d 380, 386 (1986) (holding that although the economic purpose of Section 39-71-741, MCA was legitimate, the impairment of the plaintiff’s rights under the contract clause of the 1972 Montana Constitution (Article II, section 31) was too severe to survive “heightened scrutiny”); see also *McDermott v. Montana Dept. of Corrections*, 2001 MT 134, ¶¶ 31–32, 305 Mont. 462, 29 P.3d 992 (applying strict scrutiny to statutes threatening a “fundamental right” as defined by Article II’s Declaration of Rights); *United States v. Carolene Products Company*, 304 U.S. 144, 153 n. 4 (1938) (indicating that the Court would continue to apply “more exacting judicial scrutiny” to economic legislation that implicated a fundamental right, or where the political process has closed or is malfunctioning).

that single-use plastics pose a grave danger to a clean and healthful environment without being overly burdensome on business.

94. A prohibition of local government regulation of single-use plastics—in the absence of any statewide uniform regulations—is not an “interest of the highest order.” *See Cape-France, supra*, at ¶ 31. Defendant State cannot manufacture such a compelling interest based on vague and unsupported claims of negative effects on business. The prohibition on such local regulations is a breach of (1) Defendant State’s constitutional duty to maintain and improve a clean and healthful environment and (2) the Montana Legislature’s constitutional duty to provide adequate remedies to protect the environmental life support systems from degradation. Therefore, Sections 7-1-111(21) and 7-1-121, MCA violate Montanans’ constitutional right to a clean and healthful environment. *See* Mont. Const. Art. II, § 3; Art. IX, § 1.
95. Because Defendants will fail to establish the first element of the strict scrutiny analysis, the Court need not review Sections 7-1-111(21) and 7-1-121 MCA to determine if they satisfy the second and third requirements. However, if the Court were to undertake a review of those requirements, it should conclude that these sections satisfy the second, but not the third, requirement of the analysis.
96. Sections 7-1-111(21) and 7-1-121, MCA satisfy the second requirement of the strict scrutiny analysis. They are closely tailored to effectuate the Montana Legislature’s real interest: to prohibit all regulation of single-use plastics, which they have accomplished by failing to include any statewide uniform regulations while simultaneously prohibiting local governments from adopting single-use plastic regulations.
97. Sections 7-1-111(21) and 7-1-121, MCA fail to satisfy the third requirement of the strict scrutiny analysis because their restrictions are not the least onerous path the Montana Legislature could have taken to achieve its objective: to prevent a patchwork of inconsistent single-use plastics regulations by discrete local

governments across Montana. For this reason alone, these sections are an unconstitutional violation of Montanans' fundamental right to a clean and healthful environment as guaranteed by Article II, section 3 of the Constitution.

98. The least onerous path the Montana Legislature could have taken would be the adoption of uniform, statewide regulations for single-use plastics while prohibiting any local regulations of single-use plastics. That step would have addressed any potential concern that there would be conflicting local regulations that, consequently, would impose an undue burden on business. At the same time, adopting statewide uniform regulations for single-use plastics would have satisfied Defendant State's duty to maintain and improve a clean and healthful environment imposed by Article XI, section 1 of the Constitution.
99. Sections 7-1-111(21) and 7-1-121, MCA prohibit all local governments, whether with or without self-government powers, from fulfilling their constitutional duty to maintain a clean and healthful environment by regulating single-use plastics. Therefore, Sections 7-1-111(21) and 7-1-121, MCA are unconstitutional under Article XI of the Constitution.

PRAYER FOR RELIEF

Plaintiffs pray for the following relief:

- 1) For a declaration pursuant to Section 27-8-101, *et. seq.* MCA that Sections 7-1-111(21), 7-1-121, and 7-5-131(2), MCA violate Article II, sections 1 and 3; Article V, section 1; Article IX, section 1; and Article XI, section 8 of the Montana Constitution.
- 2) For an injunction pursuant to Section 27-19-101 *et. seq.* MCA prohibiting Defendant from enforcing Sections 7-1-111(21), 7-1-121 and 7-5-131(2)(f), MCA.

- 3) An award of attorney fees and costs.
- 4) Any other relief Plaintiffs may request or the Court may deem appropriate and equitable.

Dated this 28th day of November 2023.

/s/ John Meyer
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Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, John Phillip Meyer, hereby certify that I have served true and accurate copies of the foregoing Complaint to the following on 11-28-2023:

Austin Miles Knudsen (Govt Attorney)

215 N. Sanders

Helena MT 59620

Service Method: eService

E-mail Address: dojsupremecourtefilings@mt.gov

Electronically Signed By: John Phillip Meyer

Dated: 11-28-2023

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I, John Phillip Meyer, hereby certify that I have served true and accurate copies of the foregoing Complaint - Complaint to the following on 11-28-2023:

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